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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

ANDY RAYMOND,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Andy Raymond, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Indiana, Hammond Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1971, Appendix A. A Petition for Re-hearing was denied by an order entered February 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Where the petitioner was charged in a two-count indictment with carrying on the business of a retail dealer in liquors and that he wilfully failed to pay the special occupational tax of $54.00 required by Statute, was the evidence sufficient to prove that the petitioner was a retail dealer in liquor as charged in the indictment?

2. Did the evidence prove beyond a reasonable doubt that the petitioner had knowledge of the Federal requirement for obtaining a Retail Dealer's Stamp?

3. Where the record clearly shows that had petitioner complied with the federal requirement, he would have been exposed to criminal prosecution by state authorities and had he asserted a plea of self-incrimination, it would have been a complete defense to non-compliance, should there not be a reversal?

STATUTES INVOLVED

TITLE 26, UNITED STATES CODE.

§ 5121. Imposition and rate of tax

(a) Retail dealers in liquors. — Every retail dealer in liquors shall pay a special tax of $54 a year. The Secretary or his delegate may by regulations provide for the issuance of a stamp denoting payment of such special tax as —

(1) a "retail dealer in wines" or a "retail dealer in wines and beer" if wines only, or wines and beer only, as the case may be, are sold by a retail dealer in liquors, or

(2) a "medicinal spirits dealer" in the case of a retail drug store or pharmacy making sales of liquors through a duly licensed pharmacist.

§ 5142. Payment of tax

(a) Condition precedent to carrying on business. — No person shall be engaged in or carry on any trade or business subject to tax under this part (except the tax imposed by section 5131) until he has paid the special tax therefor.

§ 5691. Penalties for nonpayment of special taxes relating to liquors

(a) General. — Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in Beer, limited retail dealer, or manufacturer of stills, and willfully fail to pay the special tax as required by law, shall be fined not more than $5,000, or imprisoned not more than 2 years, or both, for each such offense.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

This is an appeal from a conviction after a bench trial.

In December, 1968, the defendant was charged in a two-count indictment in the Northern District of Indiana, with carrying on the business of a retail dealer in liquor at 3433 Michigan Avenue, East Chicago, Indiana, and wilfully failing to pay the special occupational tax required by Sections 5121(a) and 5142(a), Title 26, United States Code, in Violation of Section 5691(a), Title 26, United States Code. Each of the two counts covered specific portions of defendant's taxable years. Following a three day trial to the court the defendant was found guilty of Count I of the indictment which covered the taxable period of November 1, 1967 to March 15, 1968, and was found not guilty as to Count II and subsequently sentenced to two years, six months to be served, placed on probation for a period of five years and fined the sum of $1000.00.

The Evidence

Sometime in the spring of 1967, the defendant and George Plakos rented a portion of the premises located at 3433 Michigan Avenue in East Chicago, Indiana. (Tr. 10, 11) The premises were a commercial establishment on the first floor with apartments upstairs. (Tr. 10) Beginning November 1, 1967, Raymond began paying the landlord rent for the premises. (Tr. 22) Gambling activities took place on the premises (Tr. 46, 75-76, 115)

Government undercover agents George W. Haney, A. R. Munro and Robert W. Van Hengel testified that on occasion during the time involved in Count I (November 1,

1967 until March 15, 1968) they purchased alcoholic beverages from Patricia Erickson on the premises at 3433 Michigan Avenue, East Chicago, Indiana.

Agent Van Hengel testified that on November 1, 1967, he carried into the 3433 Michigan Avenue premises two pints of VO (whiskey) and two six packs of beer and some ice for a girl named Peggy Edwards or Marian who worked at a bar at 4410 Michigan Avenue. On November 1, Van Hengel purchased a drink for $1.00 (Tr. 122) The VO and beer which Van Hengel carried for Peggy was hers. (Tr. 127) She asked if he would help her carry stuff down to the "Barbut House", and help her set up the bar which he did. (Tr. 114-115) Peggy was working for Joe Casper who had a bar down the street at 3410 Michigan Avenue and Van Hengel worked part-time for Casper as well. (Tr. 127) Van Hengel was next on the premises on November 9, 1967, and testified that he was advised by a girl named Pat that beer and whiskey would be available "from now on". He did not testify that he observed any drinks being served or any money exchanged. Van Hengel was next in the premises on November 16, 1967, at which time he was served coffee but observed drinks being served and money exchanged between customers and Pat Erickson. (Tr. 117) On November 18, 1967, drinks were being served and Van Hengel was served drinks by Pat Erickson for 75 cents (Tr. 118-119)

On February 23, 1968, Agents Haney and Van Hengel were served drinks for which they exchanged money with Pat Erickson. (Tr. 45-47, 119) Agent Haney testified that he purchased three drinks from Pat Erickson for which he was charged $2.50 and he gave her $3.00. (Tr. 46) Agent Van Hengel testified on the same date he ordered a drink

for Haney and himself and paid "a buck a piece" for them. Agent Munro testified that he was present on February 23, 1968, observed drinks being served, that he ordered a drink but was not served. (Tr. 78)

On February 25, 1968, Agent Munro was served a drink by Pat Erickson, asked her how much he owed her, she said 75 cents and he gave her a dollar. (Tr. 80) On March 2, 1968, Agents Haney and Van Hengel were on the premises, asked Pat Erickson for a drink when they were up at the front of the premises, near the counter, but were not served. The agents and Pat Erickson were told by the defendant that the drinks were for players only and that the premises were a "gambling joint" and not an after hours joint. (Tr. 51, 120)

On March 10, 1968, Van Hengel was served by Pat Erickson, (Tr. 121)

On March 15th, 1968, Munro was served by Pat Erickson. (Tr. 83) Van Hengel was served by Pat Erickson. (Tr. 121-122) The defendant was not on the premises at that time.

On March 15, 1968, the premises were raided, in a raid led by Agent Quinn, who was in possession of a search warrant, and three bottles of whiskey, one full and two partly full, and twenty-two cans of beer were seized. (Tr. 153)

Agents Quinn and Morissey testified that in September of 1968 they paid a visit to Mr. Raymond while looking for "Cooky" and at that time Mr. Raymond said "When am I going to get my booze back" or words to that effect. (Tr. 159, 166) Pat Erickson testified that she served beer, whiskey, coffee and sandwiches as an accommodation to

players, received gratuities and paid Raymond a monthly fee of $40.00 as a rental or concession fee. With regard to the alcoholic beverages, she testified that they were brought in by various persons who played, she periodically replenished the supply, she served them as an accommodation, and kept the beer in a refrigerator to keep it cold. (Tr. 195-197) None of the whiskey that was brought into the premises was ever brought in by Mr. Raymond. (Tr. 206-207)

The government introduced in evidence an Illinois Retail Liquor License application filed by one Andy Raymond in 1954. (Tr. 16-18). The trial court at the request of the government took judicial notice of the statutes of the State of Indiana which made it illegal to operate a gambling house or sell liquor after 1:00 o'clock in the morning or on Sundays.

REASONS FOR GRANTING THE WRIT

The Courts below have denied the petitioner his right to due process of law and his right to a fair trial as established by the Constitution and interpreted by the decisions of this Court.

1. The Evidence Was Insufficient To Prove That Petitioner Was a Retail Dealer In Liquor As Charged In The Indictment.

The argument has been advanced that the alleged liquor retailing of Raymond was proven by the fact that Raymond told certain agents "What is going to happen to my booze and stuff. Am I going to get it back?" (Tr. 159)

This statement was made on September 26, 1968 (Tr. 157) and some six months after March 15, 1968, when a Federal Search Warrant was executed on the premises commonly known as 3433 Michigan Avenue, East Chicago, Indiana, (Tr. 153) Agent Quinn testified that he executed the Federal Search Warrant on March 15, 1968 on the premises in question and that three bottles of whiskey, one full, the other two partially full, and twenty-two cans of beer were seized. (Tr. 153). The record does not disclose the time of the raid. Raymond was not in the premises at the time of the raid (Tr. 159). Agent Morrissey testified that a standard letter had been sent to Raymond stating what provisions were available to seek relief from the seizure. (Tr. 169). The record does not disclose that Raymond made any requests for the return of the seized property. It is respectfully submitted that Raymond is not charged with unlawful possession of liquor, if in fact he had possessed it but rather with being a retailer in

liquor without the proper stamp provided by statute. The fact that on September 26, 1968, he asked the agents as to the disposition of the liquor at best tends to prove that he asserted ownership of the same at that time. That contention could well have been induced by the unsolicited official letter that he received from Internal Revenue Service advising him of remedies available in regard to seized property. An assertion by Raymond of some right to the liquor does not prove that he was a retailer. This conversation allegedly occurred on September 26, 1968, some six months after the raid of March 15, 1968, and approximately two months before indictment. Two of the agents from the Alcohol and Tobacco Division of the Internal Revenue Service, were seeking the whereabouts of a character by the name of "Cooky". (Tr. 158; 166). For some undisclosed reason, Raymond was visited as a likely prospect to cooperatively supply the information sought. Fortunately for Mr. Cooky, Raymond did not know anything about him. (Tr. 166). Naturally then, the agents suppressed the urgency of the pursuit of Cooky and decided to stay awhile and chit-chat with Raymond. The matter of Cooky having been disposed of, they proceeded to discuss such folksy topics as the origin of Raymond, and they even discovered that they had mutual acquaintances. (Tr. 158). In that superficially induced spirit of comradeship, Raymond asked particulars in regard to the government letter concerning the seizure that led to his alleged inquiry as to the disposition of "my booze". Such testimony is ingeniously incredulous. To use a favorite expression of the government — the inference flowing therefrom — is that the government on September 26, 1968, and at a time that Raymond had been marked for prosecution, sent its agents to him in an attempt to obtain indirectly damaging statements that it

could not have obtained in a direct inquisitorial way without first advising Raymond of his constitutional rights.

It is asserted that Raymond's retailing of liquor is further proven by the fact that on one occasion he reprimanded Erickson by saying:

> "I want to know what the hell happens to all the whiskey that I bring into this place. It's always gone the next day". (Tr. 76-77).

It's difficult to see how such a statement even remotely implies that Raymond was a retail dealer in alcoholic beverages. A retailer in any commodity, provided he possesses some degree of sanity, is overjoyed when his merchandise is consumed because normally sales generate a profit. At any rate this statement was allegedly made by Raymond on June 18, 1967, in the presence of Agent Munro, (Tr. 75-76). That period was covered by Count II of the indictment. The trial court has found Raymond not guilty as to that count and therefore any evidence adduced in regard to Count II is legally non-existent.

> *Dunn* v. *United States*, (1932) 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 35.

The evidence does not indicate that Raymond served or dispensed any drinks himself. While it's true that the actual dispensing of alcoholic beverages by the defendant himself is not required, it is also true that evidence must be introduced to show that whoever was dispensing the liquor was doing so as an employee of the defendant. In *Hale* v. *United States*, 149 F.2d 401 (5th Cir. 1945), the court states:

> ". . . Hale had a negro woman retailing whiskey for him at his cafe in June, 1944, and a negro man doing

> the work at the adjoining restaurant during July 1944. *That both so testified,* and other witnesses strongly corroborated them as to two particular sales." (Our emphasis)

It is clear that the *Hale* case is of no assistance to the government. There is no evidence that Erickson was the employee of Raymond or that she retailed whiskey for him. In *Heath* v. *United States,* 169 F.2d 1007 (10th Cir. 1948) and *Desimore* v. *United States,* 227 F.2d 864 (9th Cir. 1955), the question of what constitutes "doing business" is discussed. In the *Heath* case, at page 1009, the court states:

> ". . . 'Doing business' is a term with a well established and generally understood meaning. It connotes a venture or undertaking in a particular line of endeavor extending over a period of time. While the profit motive is not essential to carrying on business, profit, generally is the motivating cause of business undertakings . . ."
>
> ". . . A brief outline of the testimony of Benjamin J. Kepler, a government agent and the government's chief witness on this question, is as follows . . . they then arranged a meeting for that night out in the country *where appellant delivered* fifty-seven fifths and sixty-seven pints of liquor and was paid therefor $124; that on February 6, 1947, following the first meeting, Kepler again called appellant from a Salina hotel and arranged a meeting with him; that when they met he told appellant he wanted some more whiskey; that appellant said he was short on pints but could let him have all the fifths he wanted; that they arranged another meeting in the country for the delivery of the whiskey; that he met appellant and his two brothers, Charley and Raymond; that he received the whiskey and paid for the same by giving Charley $150 in marked bills. The marked bills were found on him after he was placed under arrest and taken

to the Sheriff's office. It would be difficult from this evidence, if believed, to reach any other conclusion than that appellant was engaged in business as a wholesale liquor dealer . . ." (Our emphasis).

The *Desimore* case involved several defendants charged with conspiring to carry on the business of retail liquor and wilfully failing to pay a special tax as required by law. Desimore occupied the premises, hired and fired the help and tended bar at times himself. He was shown on certain official records filed by the club as Vice-President and Manager thereof and he had admitted he had no Federal Retail Liquor Dealer's Stamp. The court at page 865, states:

". . . The White Center Athletic Club owned and operated certain premises containing a lobby, main room, office, cloakroom and kitchen. In the main room were a bar, slot machines and dining tables with chairs. Meals were served to individuals and groups for consideration. The members brought their own liquor, *which was dispensed by employees* for a service charge. But non-members also purchased liquor there by the drink, and liquor was sold for club parties held on the premises. The seals on the liquor bottles in the place were defaced so that the numbers on the federal strip stamp would not be legible. There was evidence of specific acts of storing liquor upon the premises, which the court found were joined in by all defendants. 'House' liquor was found to have been served at parties of outside organizations for consideration. *The employees* were found to have served house liquor by the drink, and the court found these were acts of all defendants. There was evidence upon which it was found properly that the establishment was operated as a business of a retail liquor dealer. There was conclusive evidence that the special federal tax required by law for operating such a business was never paid. While the place was operating, it was raided re-

peatedly by state officers, and the bartenders were convicted of selling liquor by the drink . . .". (Our emphasis).

The distinguishing feature of this case from those cited above is that there is no scintilla of evidence tending to show that Erickson was an employee of Raymond. While the trial judge could disregard her testimony and find it false, that finding did not obviate the necessity of bringing forth or introducing evidence to show that she in fact was not an independent contractor as her testimony indicates but rather an employee. The Government heavily relied on inferences to be drawn on all the evidence. Curiously the government ignored the fact that government's exhibit 10 (Tr. 106-113) contained a detailed record of all the earnings of the employees of Raymond for the year 1967, and government's exhibit 11 (Tr. 160-161) also shows all wages for 1968. Pat Erickson does not appear as an employee in either exhibit.

There is nothing in the record to negate the testimony of Pat Erickson that she supplied and dispensed the alcoholic beverages on her own without being the employee of Raymond. She was clearly an independent contractor and as such one who had undertaken to perform a piece of work at her own risk and cost (41 Am. Jur. 2d, Sec. 1, p. 739). Concededly under 18 USC 2, Raymond could have been charged as a principal and one who had aided and abetted Pat Erickson to commit the crime charged in the indictment. However Raymond was not so charged and if he were, and provided all other elements of the offense were proven, it would then be a defense if Pat Erickson did in fact have the required Federal Retail Liquor Dealer's Stamp. Curiously, the existence or non-existence of such stamp is not demonstrable by the evidence.

2. The Evidence Did Not Prove Beyond a Reasonable Doubt That The Petitioner Had Knowledge Of The Federal Requirement For Obtaining a Retail Dealer's Stamp.

"Wilfulness" is a rather elusive term. It has been stated that a lesser showing of wilfulness is required when the crime charged is a misdemeanor than where the crime is a felony. *Spies* v. *The United States,* (1943) 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418. In this case, Raymond is charged with a crime punishable by imprisonment of up to two years and pursuant to 18 U.S.C. 1 the same is a felony. The test of wilfulness as found in the statute involves more than a finding that the defendant's acts or omissions were intentional. *United States* v. *Murdock* (1933) 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381. In *United States* v. *Palermo,* (1958 CA 3, Pa.) 259 F.2d 872, the court in criticizing the lower court for its failure to include in its test the factor of evil motive or bad purpose, the court stated that factors such as those found by the lower court, including obstinacy, action without justifiable excuse, and careless disregard, were not factors which, either singly or cumulatively, were self-sufficient to establish "wilfulness" under the statute, and the court also included among these factors that of "gross negligence". Adhering to its opinion in an earlier case involving the felony section dealing with wilful evasion of taxes, the court in *United States* v. *Martell,* (1952 CA 3, Pa.) 199 F.2d 670, cert. den. 345 U.S. 917, 97 L. Ed. 1350, 73 SC 728, held that "wilfulness" required a specific wrongful intent, and an "evil motive", the burden of establishing which is on the prosecution. The court then held that the proper standard of wilfulness, as applied to the situation presented, required the existence of a specific wrongful intent — an evil motive — *at the time* the crime charged was committed. (Our em-

phasis). Mere laxity or careless disregard of the duty imposed by law, or even gross negligence, unattended by "evil motive", is not probative of wilfulness, the court held.

The "wilfulness" test enunciated in the *Palermo* case, (*Ibid*) was approved in *United States* v. *Goodman,* (1961 DC Ill.) 190 F. Supp. 847.

Similarly, in *United States* v. *McGonigal,* (1963 DC Del.) 214 F. Supp. 621, a prosecution for failure to purchase a gambling tax stamp, it was stated that in order for a criminal act to be wilful, it must be committed not only deliberately and knowingly, but with a bad motive or evil intent. Simply stated, the government must prove, in order to convict, that the defendant deliberately committed the specified violation with the intention of "getting away with it", the court held.

The court of Appeals for the Fifth Circuit also appears to require, as part of the test for wilfulness under the statute, that there be not only knowledge of the existence of the obligation, but also a wrongful intent to evade it. Thus, in *Hargrove* v. *United States,* (1933, CA 5, Tex.) 67 F.2d 820, 90 ALR 1276, where defendant was convicted of wilfully failing to file income tax returns, it was held that the trial court had erred in refusing to give a requested instruction to the effect that the term "wilful" as used in the statute making the wilful failure to file an income tax return a misdemeanor, implied a knowledge on the part of the defendant and a purpose to do wrong. The lower court's position that if defendant had failed to make his return and pay his tax when due, the failure must be deemed in law to have been wilful, was rejected by the court on appeal, as failing to distinguish between a statute simply denouncing the doing of a criminal Act,

and one denouncing as criminal only the wilful doing of an act, as in the statute under consideration. In a statute making criminal the wilful doing of an act, the court held, a specific wrongful intent, that is, *actual knowledge of the existence of the obligation* and a *wrongful intent to evade it*, is of the essence. (Our emphasis).

It is clear from the foregoing that "wilfully" as used in this statute is composed of two elements, the first being knowledge of the existence of the obligation and the second being a bad motive or evil intent to evade it.

The government contends that Raymond had knowledge of the requirement of the Federal Tax Stamp since government's Exhibit 2 (Tr. 16-18) purports to show that in 1954 Raymond applied to the Illinois Liquor Control Commission for a liquor license which application, the government reasons, made Raymond aware of the necessity of the Federal Tax Stamp. Close examination of this Exhibit does not disclose *that any reference whatsoever is made to the procuring or necessity of obtaining a Federal Tax Stamp.* There is no evidence that shows that the defendant did in fact obtain a Federal Tax Stamp on that occasion. Undeniably, the best evidence of proving that Raymond in 1954 had in fact obtained a Federal Tax Stamp, would have been the introduction in evidence of the governmental record disclosing such transaction. The fact that the government did not produce such record leads to the reasonable inference that none ever existed.

The case of *Orloff* v. *The United States*, 153 F.2d 292, does not stand for the proposition that one of the well recognized circumstances from which wilfulness can be inferred is prior business experience in the field. It rather clarified what type of prior experience will suffice. The court beginning at page 294 stated:

> " . . . However, the court committed prejudicial error in its failure properly to limit the scope of certain

testimony as to the commission by the appellant of a similar offense fifteen years before that charged in the indictment . . . No limit is placed upon the power of the court to admit evidence of prior similar transactions committed by the accused in the ordinary course of his business, where, as here, a specific intent to defraud is an element of the offense . . . the fact that he *personally was engaged in the illicit liquor business* a number of years before the period covered by the indictment is relevant as to the existence of guilty knowledge. It tended to show his experience in such transactions . . . ". (Our emphasis).

It is clear that the *Orloff* case (*Ibid*) refers to testimony in regard to a prior similar offense to that which the particular defendant was charged. And even the government has not yet contended that Raymond by applying to the State of Illinois in 1954 for a liquor permit, had committed an offense.

To prove the requisite knowledge on the part of Raymond, the government heavily relied on the following findings of the trial court:

" . . . It is interesting to note the entries appear first in the books and records of the defendant beginning in January, 1968, and ran for a period of four months. I would be highly suspicious that the entries were made after the raid and after the indictment in this case, which came in December, 1968, and before the 1968 tax returns were due. *Were it not for the testimony of Mr. Slay* who testified he received these books monthly and *the entries were there* when he received the books at the end of January, February, March and so forth. *I have no reason to disbelieve Mr. Slay*, but assuming his testimony is correct and the entries were there at the end of January, 1968, February 1968, March 1968, and April, 1968, respectively, based upon the testimony of Miss Erickson — and the only purpose for these entries is to support her testimony she

actually paid rent during that period — it makes them highly suspect, that this was done for the purpose of trying to avoid any consequences for the sale of liquor on the premises.

Again, if I were instructing the jury, I would have to instruct them that any exculpatory statements were made that were untrue, then such statements can be considered as evidence of guilty knowledge. I think that is exactly what these entries were. They were made as a matter of defense for any future trouble that might occur." (Tr. 378-379).

" . . . As far as the Government witnesses are concerned, their testimony was well documented. There has been a suggestion here that they went out to build a case out of whole cloth, I guess. My only remark as to that statement is that if they did, they could have done a much better job, *they could have tied up any loose ends,* by manufacturing evidence or giving false testimony. I cannot believe that all these Government agents were perjuring themselves. I don't say it is impossible, or that in all instances Government Agents should be believed simply because they are Government Agents. Their testimony has to be weighed against the rules of evidence as to reasonableness and all of the other rules. I find nothing unreasonable about their testimony. As I say, if they were out manufacturing evidence or out to build a case out of whole cloth, they could have certainly done a better job.

Having found as I have, that not only was this the defendant's liquor, but it was dispensed for a price, we now come to the question of wilfulness or intention to violate the law. I don't have much difficulty with that problem based upon the facts here. The defendant has been in the liquor business on previous occasions, as shown by the evidence. *Presumably he knew what the requirements of the law were.* Not only that, but as I already stated, the entries in the books of the rent payments by Miss Erickson were made beginning,

> strangely, on January 1, 1968, at the time when it was possible to include them in the tax records for that year, and at a time when it was impossible to go back beyond that date and include them in the 1967 returns because those returns were presumably already made and the record could not be changed. I find evidence of guilty knowledge made on the part of the defendant, and this record was made for the express purpose of trying to build a defense against this activity . . . ". (Tr. 381-383). (Our emphasis).

Raymond respectfully submits that such inferences were not supported by the evidence. In *New York Life Insurance Company* v. *McNeely,* (1938), 79 Pac.2d 948, in a well reasoned opinion, the court shows the correct way to deal with inferences and supplies the correct rule as follows:

> " . . . The principle which is applied by the average man in his own private affairs usually is that no matter how many inferences are piled on each other, it is only necessary that each successive inference should be more probable that any other which might be drawn under all the circumstances. The Courts, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibilities, conjectures, or even, generally speaking, a bare probability. *In criminal cases, they demand that when a conviction is to be based on a chain of inferences, each and every link in that chain must exclude every other reasonable hypothesis.* In civil cases, involving only property rights, the rule is not so strict, and is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven . . . " (Our Emphasis).

This case is approvingly cited in 1 Wigmore on Evidence, Par. 41, Third Edition, p. 438.

In the instant case, it is apparent that the trial court based its decision upon inferences drawn upon inferences; contrary to the foregoing rule of law.

The court inferred that Raymond, having applied for a state liquor permit in Illinois some 14 years before, is presumed to know the requirement of a Federal Stamp. This inference does not follow. There is no evidence that he obtained a Federal Stamp in connection with his prior business or that he knew that a Federal Stamp was or was not required. There was nothing in the Illinois liquor application with regard to a Federal Stamp. If Raymond had in fact obtained a Federal Stamp in connection with his prior business, it seems strange that the government would not have introduced its own records to prove it.

The court stated that it did not believe Erickson's testimony that she was paying rent to Raymond and therefore inferred that she was an employee of Raymond. There are no facts upon which to base this inference. The government put in evidence Raymond's books and records for 1967 and 1968, Exhibits 10 and 11 (Tr. 33-161). These records list Raymond's employees and the wages paid to them and in neither year is Erickson shown as an employee. If in fact she were an employee, it would be to Raymond's advantage to list her as such and claim her wages as a business expense. There was no evidence that Raymond paid Erickson any wages and there was no evidence that Raymond received any part of the money which Erickson received in connection with serving drinks.

The court infers that the entries in the books of rent payments by Erickson beginning January 1, 1968, were made for the express purpose of trying to build a defense. It is just as reasonable to infer that the entries were made because Erickson was in fact paying Raymond rent, as she testified. Furthermore, it is difficult to follow the

court's reasoning that the entries were made for the purpose of building a defense. The court indicates that it has no reason to disbelieve Slay who testified that he saw the January and February entries prior to the raid, which was on March 15, 1968. If the court is inferring that Raymond was building a defense by making entries prior to the raid, then the question comes to mind as to why similar entries were not made in November and December, 1967, during which months Erickson was likewise serving liquor.

It is respectfully submitted that an inference of knowledge should not be sustained unless there is a "reasonable connection" between the fact proved and the fact presumed. *Tot* v. *U. S.*, 319 U.S. 463 (1943). It must " . . . At least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact." *Leary* v. *U. S.*, 395 U.S. 6, 36 (1969).

It is a matter of public knowledge that the Internal Revenue Service of the United States maintains records of all its transactions. Such a fact may be judicially noticed by any court. The submission of the government of an Illinois Liquor application in 1954, which discloses no reference as to any requirement for a Federal Stamp, has no rational connection with the inference that because of that State application, Raymond knew of the Federal requirement.

Reason and experience must make it more likely than not that the fact inferred follows from the fact proved. A blanket inference of knowledge on the part of Raymond because of a State application some 15 years ago fails to meet this standard.

Had the court found that the State application did not prove the requisite knowledge, the finding of the trial judge that Raymond's entries in his books for January and Feb-

ruary, 1968, showed "guilty knowledge", would not be sufficient to justify the inference of knowledge of the Federal requirements. There are many rational explanations for such entries other than knowledge of Federal law, for example it could be that the entries in fact reflected the truth or possibly were made in an attempt to avoid any difficulty with State Authorities.

3. Where the record shows that the petitioner at the trial level could have successfully asserted the defense of self-incrimination, but failed to do so, his constitutional right should not be considered as waived.

There is no question that the record discloses that the petitioner was involved in operations that were in violation of the criminal statutes of the State of Indiana. The trial court took judicial notice of such statutes at the request of the government. Had he applied for a Federal Retail permit, he then would have exposed himself to discovery and prosecution by the State authorities. Had he asserted at the trial level the defense of self incrimination for his non-compliance with the federal requirement, in line with the teachings of *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62 and *Leary* v. *United States,* 395 U.S. 6, cases, it would have been a complete defense. However, no such plea was ever asserted or presented. The question then is as to whether such failure should be considered as waiving the protection of the 5th Amendment. Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights. This court has held that waiver of a constitutional right is not likely to be inferred, *Smith* v. *United States,* 337, U.S. 137.

When the trial court was asked to judicially notice the criminal statutes of the State of Indiana and it became

apparent that had petitioner complied with the federal requirement of obtaining a retailer's stamp he would then have exposed himself to State prosecution, it was the duty of trial counsel to plead such defense. Under these circumstances it is clear that there had been no opportunity for trial counsel to consult with the petitioner nor reflect upon the necessity of such a plea. If it be considered that the petitioner then waived his right to constitutional protection against self incrimination, it would then be tantamount that protection of the constitution is dependent upon ability of trial counsel to make the correct decision at the fleeting moment during the trial that the first opportunity arises. Where a constitutional right is involved and it clearly appears on the record that the same was infringed it should be given recognition at any stage of the legal ladder and without regard as to whether or not it was asserted at the trial level.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that his petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18505

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ANDY RAYMOND,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.

January 20, 1971

Before KERNER, PELL and STEVENS, *Circuit Judges.*

KERNER, *Circuit Judge*: Appellant, Andy Raymond, was convicted after a bench trial in the district court for carrying on the business of a retail dealer in liquors and wilfully failing to pay the special tax required by 26 U.S.C. §§5121(a) and 5142(a), which is a violation of 26 U.S.C. §5691(a). Appellant asserts on appeal that he was not a retail dealer in liquors, as defined in 26 U.S.C. §5122, and that his failure to pay the tax was not wilful. We find both contentions without merit and affirm the conviction.

Appellant was the sole proprietor of premises used as an after-hours gambling establishment from November 1, 1967, to March 15, 1968. A number of federal undercover agents for the Alcohol, Tobacco and Firearms Division of the Treasury Department testified that on several occasions they bought drinks and observed patrons being served and paying for drinks at Raymond's club. The drinks were served to the customers and money collected from them by Miss Pat Erickson. Raymond was present in the club on each occasion when the agents participated in and viewed purchases by the customers from Miss Erickson. On March 15, 1968, a raid was conducted in which three bottles of whiskey and twenty-two cans of beer were seized.

Raymond does not dispute the fact that drinks were dispensed at his club, but claims that Miss Erickson was the dealer required to pay the special tax on the theory that she conducted a private concession and was an independent contractor vis-a-vis Raymond. The trial judge concluded that Raymond was the dealer because he found that Miss Erickson was answerable to Raymond for the manner in which she dispensed the drinks and that Raymond owned some of the liquor that was dispensed. We believe the evidence amply supports these findings.

The testimony at trial showed that on two occasions, Raymond had stated that some of the liquor dispensed to the customers belonged to him. Once, Raymond asked Miss Erickson, in the presence of an agent, what she did with all the liquor he brought to the club. Some time after the raid and seizure of the liquor, Raymond asked an agent, "What is going to happen to my booze and stuff. Am I going to get it back?" Both statements indicate that Raymond had an interest and control over the liquor which was dispensed by Miss Erickson.

The evidence further indicates that Miss Erickson was acting for the benefit and under the supervision of Raymond. On cross-examination, Miss Erickson inadvertently referred to herself as an employee. The judge found the rest of her testimony, in which she explained that she was conducting a private concession, to be incredulous. She stated that she paid Raymond $40 per month for the privilege of running a concession in his club; she further testified that she did not charge the customers for the drinks she served them, and merely accepted tips. Yet, this kind of concession would have been highly unprofitable for her. After the payment to Raymond was made, she would have realized less than $40 per month in profits. The judge concluded that " . . . it is unbelievable that under these circumstances she would volunteer to pay $40 a month for the privilege of rendering this service . . . to the defendant. . . . " We agree. The trial judge who had an opportunity to observe the witnesses and determine their credibility could well have concluded that her explanation justifying the independent contractor theory was a fabrication designed to exculpate Raymond for liability as a retail dealer under the statute. The evidence supports the finding that he was the dealer obligated to pay the tax. *Hale* v. *United States,* 149 F. 2d 401 (5th Cir. 1945).

Raymond also argues that since there was no fixed charge to the customers, and the liquor was provided as a service incidental to the gambling, he did not profit from the liquor transactions and, for that reason, should not be considered a dealer. A desire for profit need not be shown to establish liability as a dealer. *Heath* v. *United States,* 169 F. 2d 1007 (10th Cir. 1948). Distribution of liquor as a service does not excuse the obligation to pay the tax. *Desimone* v. *United States,* 227 F. 2d 864 (9th Cir. 1955).

We also believe that the appellant's failure to pay the tax was wilful as required by 26 U.S.C. §5691(a). Appellant argues that the government must prove that he knew of the duty imposed on him by the statute, and that his failure to pay the tax was based on an evil motive. See *United States* v. *Schipani,* 362 F. 2d 825 (2d Cir. 1966), cert. denied 385 U.S. 934 (1966); *United States* v. *Fahey,* 411 F. 2d 1213 (9th Cir. 1969). Assuming, but not deciding, that these are the elements of wilfulness under §5691(a), we find that the government has met its burden of proof on this issue.

As evidence that Raymond knew that he had an obligation to pay the tax, the government introduced a 1954 application for an Illinois Retailers Liquor License, signed by Raymond. From this, the judge inferred that he was familiar with the federal tax provisions on retail liquor dealers. Prior business experience, such as this license suggests, can be the basis for an inference of knowledge and wilfulness. *Orloff* v. *United States,* 153 F. 2d 292 (6th Cir. 1946). Further, the judge found from Raymond's books and records, in which Miss Erickson's payments for the concession privilege appear, that Raymond knew of his obligation to pay the tax and consequently constructed the independent contractor scheme. Raymond's accountant testified that entries were made in the books at the end of each month from January to April, 1968. Coupled with the fact that the judge found from Miss Erickson's testimony that the independent contractor theory was a scheme to avoid payment of the tax, the entries show that Raymond constructed that scheme during the period covered by the indictment. The evil motive which appellant claims is necessary for conviction existed at that time. It was proper for the trial judge to conclude from these facts that the appellant wilfully failed to pay the tax.

For the foregoing reasons, we affirm the conviction of the district court.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, February 2, 1971

Before

Hon. Otto Kerner, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge

United States of America,

Plaintiff-Appellee,

No. 18505 vs.

Andy Raymond,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1384

ANDY RAYMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1971, and a petition for rehearing was denied on February 2, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on February 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

420-022—71

QUESTIONS PRESENTED

1. Whether sufficient evidence supports the verdict that petitioner was a retail liquor dealer and willfully failed to pay the tax imposed on such dealers.

2. Whether petitioner, although he did not raise the matter in either court below, may assert the privilege against self-incrimination to bar his prosecution.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of having willfully failed to pay the tax on retail liquor dealers imposed by 26 U.S.C. 5121(a) and 5142(a). He was sentenced to two years imprisonment (of which he was required to serve six months, followed by five years probation) and fined $1,000.00. The court of appeals affirmed (Pet. App. A).

The evidence showed that in April of 1967, one George Plakos and petitioner rented the downstairs portion of a building located in East Chicago, Indiana for the ostensible purpose of operating a coffee house (Tr. 10–11, 29). The premises were actually used for gambling activities (Tr. 46–47, 53, 57, 75–76, 83, 87, 93, 115). Some six months later, due to illness, Plakos withdrew from the business, leaving petitioner in sole control (Tr. 17–18, 30–32).

Special undercover agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department testified that on numerous occasions they were admitted to petitioner's establishment, and viewed patrons being served and were themselves served alcoholic beverages by the waitress, Pat Erickson, in

exchange for money (Tr. 46–48, 77–78, 113–115, 128–129). Petitioner was present and exercised control over the premises on each occasion, determining who would be admitted as well as directing the activities of the dealers (Tr. 49, 77, 79, 88, 99).

On March 2, 1968, agents Van Hengel and Haney were admitted to petitioner's establishment and went directly to the bar, where they ordered drinks from Miss Erickson. When she started to pour, petitioner came from the gambling portion of the room and said to Miss Erickson, "I have told you before that drinks are for the players." He turned to the agents and said "This is not an after-hours joint, it is a gambling joint." (Tr. 51, 120.)

Federal agents subsequently obtained a search warrant and under its authority entered petitioner's establishment on March 15, 1968; they seized three bottles of whiskey and twenty-two cans of beer (Tr. 152–153). Later, while agents were talking to petitioner about another matter, petitioner asked "What is going to happen to my booze and stuff? Am I going to get it back?" (Tr. 157–159). During this conversation petitioner indicated that he had previously been a tavernkeeper in Illinois (Tr. 158–159). A special agent for the Illinois Liquor Control Commission testified that in May of 1954 petitioner had applied for an Illinois retail liquor license (Tr. 65–67, 71).

It was stipulated that petitioner had not paid the tax imposed by, or otherwise complied with, 26 U.S.C. 5121(a) and 5142(a) (Tr. 150). Petitioner did not dispute the fact that drinks were dispensed at his

club, but argued, as he does here, that he was not a retail dealer in liquors within the statutes and that his failure to pay the tax was not willful.

ARGUMENT

1. Petitioner attacks the sufficiency of the evidence supporting his conviction (Pet. 8–22), asserting that Miss Erickson conducted a private concession in his club and that she, as an independent contractor, was the dealer required to pay the tax. The opinion of the court below details the pertinent facts which support the trial court's determination that petitioner, not Miss Erickson, was the retail liquor dealer, and knowingly failed to pay the tax (Pet. App. A 2–4). Although Miss Erickson testified that she had conducted a private concession, the trial judge discredited her testimony. On cross-examination, she said "* * * I was the only employee, or the only worker, I mean" (Tr. 247). The remainder of her story, as the court below noted (Pet. App. A 3), was highly improbable. The evaluation of this evidence was a matter for the judge, as the trier of fact. *United States* v. *Creek*, 403 F. 2d 220 (C.A. 6); *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6), certiorari denied, 346 U.S. 828. The record as a whole fully supports the trial court's conclusion that petitioner controlled Miss Erickson's activities, owned some of the liquor dispensed, and was the dealer obligated to pay the tax.

There is similarly ample evidence in support of the trial court's conclusion that petitioner's failure to

pay the required tax was willful. The court found that petitioner's business records were altered to reflect Miss Erickson's purported status as an independent contractor during the period covered by the indictment (Tr. 382–383). In addition, petitioner's prior experience in the liquor business indicates, as the court inferred, that he knew of the federal tax requirements. See *Orloff* v. *United States*, 153 F. 2d 292 (C.A. 6); see also *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950. On these facts the court was justified in holding that petitioner willfully failed to pay the tax.

2. Petitioner further argues (Pet. 22–23) that his prosecution for failure to comply with 26 U.S.C. 5121 (a) and 5142(a) violated his Fifth Amendment right against self-incrimination. Petitioner did not raise this contention in either the trial court or the court of appeals, and thus may be deemed to have waived it; in any event, it is without merit. The courts of appeals have uniformly ruled that the statutory scheme of taxing liquor is a genuine revenue raising program, and is not unconstitutional as requiring self-incrimination. *E.g.*, *United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden*, *supra*; *United States* v. *Whitehead*, 424 F. 2d 446 (C.A. 6).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1971.

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